ST 04-0165-GIL 09/14/2004 LEASING

Lessors of tangible personal property under true leases in Illinois are deemed end users of the property to be leased. See 86 Ill. Adm. Code 130.220. (This is a GIL.)

September 14, 2004

Dear Xxxxx:

This letter is in response to your letter dated February 25, 2004, in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.ILTAX.com to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

> We represent a client ('Retailer') which sells and installs direct broadcast digital satellite television equipment ('Equipment') in the State of Illinois Retailer desires to comply with applicable Illinois statutes regarding sales and use taxes, and has requested that we present the facts of their activities so that you can provide guidance as to the application of various taxing statutes to Retailer's activities.
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> **Statement of Facts**
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> Retailer is an authorized sales agent for a digital broadcasting service (the service provider is referred to herein as 'DBS') which transmits television programming ('Programming') via satellite to residential customers in the State of Illinois. Retailer solicits customers to sign up for Programming service and to either purchase or lease Equipment in connection therewith.
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> Retailer typically installs Equipment in the customer's home. The Equipment may include a small (18') satellite receiving dish (mounted on the exterior wall or roof of a single family home) and an electronic receiver to descramble / convert Programming for viewing by the customer, connecting cables, mounting brackets, and other incidental related hardware, electronics, and integrated software. The total retail value of the Equipment is approximately $200.

All invoicing and payment for Programming fees and charges is managed by DBS.

Retailer purchases Equipment from an out-of-state vendor, and does not pay Illinois sales tax on such purchases. Retailer makes no use of the Equipment other than retention for installation or resale. Retailer holds a valid Illinois Business Tax number and regularly remits sales tax collected from customers for taxable sales.

Sales and Use Tax Fact Patterns

Three common fact scenarios are presented, as follows:

1. Sale of Equipment. The customer purchases Equipment from Retailer for cash (e.g., $200.00), Retailer installs the Equipment for no additional cost.

2. Nominal Sale of Equipment. Retailer installs Equipment for a nominal fee (e.g., $1.00). Retailer is reimbursed by DBS for the cost of Equipment provided by Retailer to customer.

3. Leased Equipment. Retailer installs Equipment in the customer's residence, with no charge for such equipment. Retailer is reimbursed by DBS for the cost of Equipment provided by Retailer to customer. The customer pays a $5.00 monthly fee to DBS for use of the Equipment. If and when customer terminates its purchase of Programming, the Equipment must be returned to DBS.

Requested Guidance

We request guidance on the following issues:

A. Please confirm that the transaction described in item 1 ('Sale of Equipment') is a sale at retail, for which Retailer is obligated to collect and remit Illinois sales tax, based on the retail selling price of the Equipment.

B. Please confirm that the transaction described in item 2 ('Nominal Sale of Equipment') results in a sale at retail based on a $1.00 transaction price. *See, e.g.,* General Information Letter ST 94-0245 (July 1, 1994).

C. Please confirm that the transaction described in item 3 ('Leased Equipment') is an exempt sale of the Equipment to DBS by Retailer, and that DBS is solely liable to pay use tax to the State of Illinois based on its lease of the Equipment to the customer.

Please do not hesitate to call me with any questions regarding this request.

DEPARTMENT'S RESPONSE:

1. Sale of Equipment.

The Retailers' Occupation Tax Act imposes a tax upon persons engaged in this State in the business of selling tangible personal property to purchasers for use or consumption. See 86 Ill. Adm. Code 130.101. In Illinois, Use Tax is imposed on the privilege of using, in this State, any kind of tangible personal property that is purchased anywhere at retail from a retailer. See 86 Ill. Adm. Code 150.101. These taxes comprise what is commonly known as "sales" tax in Illinois.

The Retailers' Occupation Tax is measured by the sellers' gross receipts from sales made in the course of such business. Gross receipts means the total selling price or the amount of such sales. See 86 Ill. Adm. Code 130.401. When Illinois retailers sell tangible personal property to customers for a particular dollar amount, they have made sales subject to Retailers' Occupation Tax liability. The retailers must pay Retailers' Occupation Tax to the Department based upon their gross receipts, or actual amount received, from the sales of the tangible personal property.

For example, a retailer in Illinois sells tangible personal property to a customer for $200. If the retailer receives no consideration for the sale from any other source, the gross receipts subject to tax for that sale is $200.

2. Nominal Sale of Equipment.

As stated above, Retailers' Occupation Tax is measured by the seller's gross receipts. The fact pattern in general information letter (ST-94-0245) referenced in your request is not applicable because the retailer in that letter is not being reimbursed for the items that are sold. For an analysis closer to your specific situation, see general information letters ST-02-0085 and ST-00-0047.

For example, a retailer sells tangible personal property to a customer for $1.00. The retailer receives $200 from a third party in regards to that transaction. The retailer's gross receipts subject to tax for that sale would be $201.

3. Leased Equipment.

The State of Illinois taxes leases differently for Retailers' Occupation Tax and Use Tax purposes than the majority of other states. For Illinois sales tax purposes, there are two types of leasing situations: conditional sales and true leases.

A conditional sale is usually characterized by a nominal or one dollar purchase option at the close of the lease term. Stated otherwise, if lessors are guaranteed at the time of the lease that the leased property will be sold, this transaction is considered to be a conditional sale at the outset of the transaction, thus making all receipts subject to Retailers' Occupation Tax.

A true lease generally has no buy out provision at the close of the lease. If a buy out provision does exist, it must be a fair market value buy out option in order to maintain the character of the true lease. Lessors of tangible personal property under true leases in Illinois are deemed end users of the property to be leased. See 86 Ill. Adm. Code 130.220. As end users of tangible personal property located in Illinois, lessors owe Use Tax on their cost price of such property. The State of Illinois imposes no tax on rental receipts. Consequently, lessees incur no tax liability.

As stated above, in the case of a true lease, the lessors of the property being used in Illinois would be the parties with Use Tax obligations. The lessors would either pay their suppliers, if their suppliers were registered to collect Use Tax, or would self-assess and remit the tax to the Department. If the lessors already paid taxes in another state with respect to the acquisition of the tangible personal property, they would be exempt from Use Tax to the extent of the amount of such tax properly due and paid in such other state. See subsection (a)(3) of 86 Ill. Adm. Code 150.310.

Under Illinois law, lessors may not "pass through" their tax obligation to the lessees as taxes. However, lessors and lessees may make private contractual arrangements for a reimbursement of the tax to be paid by the lessees. If lessors and lessees have made private agreements where lessees agree to reimburse lessors for the amount of the tax paid, then lessees are obligated to fulfill the terms of the private contractual agreements.

The above guidelines are applicable to all true leases of tangible personal property in Illinois except for automobiles leased under terms of one year or less, which are subject to the Automobile Renting Occupation and Use Tax found at 35 ILCS 155/1 et seq. There are also some limited exceptions to the general rule described in the preceding paragraphs for purchases of tangible personal property leased to governmental entities and exempt hospitals. See 86 Ill. Adm. Code 130.2011 and 130.2012.

Please note, based upon the above analysis and the information contained in you letter, we cannot agree with your conclusion that the sale of equipment to DBS is an exempt sale.

I hope this information is helpful. If you require additional information, please visit our website at www.ILTAX.com or contact the Department's Taxpayer Information Division at (217) 782-3336. If you are not under audit and you wish to obtain a binding PLR regarding your factual situation, please submit a request conforming to the requirements of 2 Ill. Adm. Code 1200.110 (b).

Very truly yours,

Edwin E. Boggess
Associate Counsel

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